U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: APR 0 8 2013

OFFICE: TEXAS SERVICE CENTER

FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions with progressive post-baccalaureate experience equivalent to an advanced degree. The petitioner seeks employment as a special education teacher for . At the time she filed the petition, the petitioner taught at Maryland. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions with the equivalent of an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and copies of standardized test results.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions progressive post-baccalaureate experience equivalent to an advanced degree under the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(k)(3)(i)(B). The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now USCIS] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on April 26, 2012. In an accompanying statement, counsel stated that the petitioner seeks the national interest waiver, but counsel did not address the guidelines set forth in *NYSDOT*. Instead, counsel listed the evidence submitted, and cited the petitioner's "Master's Degree Equivalent granted by the about twenty seven (27) years of progressive work experience . . . , and most importantly, the numerous awards she

received from [redacted] in the United States and [redacted] in the Philippines."

Degrees, experience, and recognition for achievements and contributions are all elements of a claim of exceptional ability. *See* 8 C.F.R. §§ 204.5(k)(3)(ii)(A), (B) and (F), respectively. Thus, counsel essentially claims that the petitioner merits a waiver as an alien of exceptional ability in her field. As noted previously, exceptional ability in the sciences, the arts or business is not sufficient to warrant the national interest waiver. The plain wording of section 203(b)(2)(A) of the Act indicates that aliens of exceptional ability are subject to the job offer requirement (including labor certification).

Counsel continued:

> Her accomplished dedication . . . has not only theoretically helped improve the education in the country but most importantly has in the process completely and realistically re-created the young lives of students worth living as evidenced by the testimonials. And as we know, these heartfelt testimonials are as powerful as any award or citation from recognizing bodies.
>
> In addition, the merit of [the petitioner's] request for National Interest Waiver is based on the **improvement to the United States Education more particularly in the field of Special Education, which she has actually already been fulfilling as Special Education Teacher in the State of Maryland since 2005**. Notwithstanding this, [the petitioner] is determined to continue her selfless service to the nation of improving the Special Education in the United States of America by challenging other public schools in the country to equal at least or better yet surpass the progress obtained by her students in Maryland.

(Counsel's emphasis.) The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore, it is necessary to examine the evidence submitted in support of the petition. In terms of the petitioner "challenging other public schools in the country" to match or exceed her students' progress, the petitioner must show, first, that her students have in fact made a conspicuously significant level of progress in comparison with other special education students, and second, that teachers and schools across the nation are aware of the "challenge" that counsel claimed the petitioner has posed. In this regard, letters from the petitioner's former students, whatever their emotional appeal, do not show the broader impact and influence that the *NYSDOT* guidelines demand. Likewise, submitted letters from school administrators, teachers, and parents of students showed appreciation for the petitioner's diligent efforts on behalf of her students, but do not establish wider impact or influence, either in the past or prospectively.

[redacted] testing coordinator for [redacted] stated:

> This is to certify that [the petitioner's] kindergarten class has performed excellently in our school's recent assessments. Data show that 80% - 100% of her students performed over and above the quarterly benchmarks and have already met the end-of-school year requirements. . . . Also, records show that her low performing students indicate significant improvement in their test scores as the school year progressed. This means that [the petitioner] has been utilizing intervention strategies to improve learning among these low performers.

Accompanying tables (also signed by [redacted] show, as claimed, that between 80% and 100% of the petitioner's 20 students met the October 2011 and January 2012 benchmarks for various literacy assessments, but the figures are considerably lower for most of the end-of-year benchmarks (one 90%, the rest ranging from 45% to 75%), contradicting the claim that "80% - 100% of her students . . . have already met the end-of-year school requirements." The petitioner submitted no evidence about other classes to allow a meaningful comparison between the performance of her students and that of students in other classrooms.

A section of the record labeled "Awards and Certificates" consists of photocopies of 15 certificates from schools that have employed the petitioner, as well as other local entities such as parent-teacher associations. Some certificates recognized specific achievements, such as a "Certificate of Recognition" from [redacted] Philippines, naming the petitioner "Best in Lesson Planning." Others are simply generalized expressions of appreciation. None show recognition beyond the local level.

On July 3, 2012, the director issued a request for evidence, instructing the petitioner to "submit evidence to establish that the beneficiary's past record justifies projections of future benefit to the nation" (director's emphasis), and to show her "previous influence on the field as a whole." In response, counsel stated:

> Since a 'National Special Education Teacher' is not even a real concept but more of metaphysical cognition [*sic*], undersigned wishes to once again posit a realistic proposition upon which to establish that the self-petitioner's contributions will impart national-level benefits.
>
> Even authors of books, treatises and other academic materials on Special Education are not in any standing [*sic*] to claim that their contributions are national in scope since not all special education teachers can be said to utilize their works.

The director did not state that the petitioner had to show that she is "a 'National Special Education Teacher,'" or that "all special education teachers . . . utilize [her] works." National scope is not the same as universal reliance on the petitioner's work.

Counsel stated: "it is but harmless to assert that if an NIW Petition is made with premise on some prevailing Acts of United States Congress, that by itself renders the proposed employment national in scope." This assertion may be "harmless," but it is not persuasive. All employment-based immigrant classifications are based on "prevailing Acts of United States Congress," and so is the statutory job offer requirement. There is no rational basis to conclude that Congress, by mentioning a given occupation in a particular piece of legislation, exempted aliens in that occupation from the job offer requirement.

Counsel quoted remarks made by then-President George H.W. Bush when he signed the Immigration Act of 1990, which created the national interest waiver: "This bill provides for vital increases for entry on the basis of skills, infusing the ranks of our scientists and engineers and educators with new blood and new ideas." Counsel interprets this passage to mean that Congress created the national interest waiver for educators. The Immigration Act of 1990, however, was not restricted to the creation of the waiver. It was, rather, an overhaul of the entire immigration structure, creating new employment-based immigrant classifications to replace the "third preference" and "sixth preference" classifications previously in place. "[S]cientists and engineers and educators" are all members of the professions who, under the terms dictated by Congress in the Immigration Act of 1990 (as it amended the Act), are all subject to the job offer requirement.

Counsel mentioned other legislation and court cases, all of which affirmed the importance of education but none of which exempted teachers from the job offer requirement at section 203(b)(2)(A) of the Act.

Counsel acknowledged that the job offer/labor certification requirement exists to protect United States workers. Counsel contended that a waiver of that requirement would serve the same ultimate goal, by allowing the petitioner to train "today's students [who] need to be academically competitive to guarantee their employability." Counsel further stated: "today's United States workers or Special Education Teachers are not as competitive as the foreign teachers who are already in the country since not all of them were educated by 'Highly Qualified Teachers.'" This assertion relies on the presumption that all "foreign teachers" "were educated by Highly Qualified Teachers." Counsel cited no evidence to support that claim. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, counsel essentially contended that "foreign teachers," as a class, are eligible for a blanket waiver of the job offer requirement. As members of the professions, teachers are included in the statutory clause at section 203(b)(2)(A) that includes the job offer requirement.

This claim assumes the conclusion that counsel meant to prove, specifically, that it is in the national interest for the petitioner, rather than a qualified United States teacher, to be the one teaching those particular students. According to counsel's own statistics, the petitioner's credentials do not readily stand out. Specifically, counsel asserted that "59% [of] special educators in the nation [hold] a Master's degree or equivalent," and "92% [of] special educators [have] full certification." The study that counsel cited, the "SPeNSE Study of Personal Needs in Special Education," did not indicate, as

counsel claimed, that 59% of United States special education teachers have a master's degree "or equivalent." Rather, as quoted by counsel, the study stated: "Fifty-nine percent of special educators had their Master's degree." The petitioner in this proceeding took some graduate-level courses but did not complete a master's degree. By counsel's own reasoning, the average United States special education teacher possesses higher academic credentials than the petitioner does. Later in the brief, counsel repeatedly claims that the petitioner holds a master's degree (rather than its defined equivalent), but there is no evidence to support this claim.

Counsel asserted that the petitioner possesses qualifications above the bare minimum required for the job she seeks, but cannot "tailor-fit" an application for labor certification to show those qualifications. The Department of Labor, however, has already approved a labor certification for the petitioner, and therefore counsel's speculation contradicts documented facts.

Specifically, USCIS records show that filed a petition, with an approved labor certification, seeking to classify the alien as a member of the professions under section 203(b)(3) of the Act. The director approved that petition on February 23, 2009; the approved petition has a priority date of May 30, 2008. There is no indication that withdrew that petition or that the director revoked its approval; the approved petition remains in effect. There is, therefore, little point in speculating whether the petitioner could obtain an approved labor certification, as she has already done so.

Counsel cited a study showing that special education teachers "shift careers" and move to general education, and therefore "[t]he protection afforded for US workers enshrined in the labor certification process will not in any way be jeopardized by grant of waiver in favor of" the petitioner. The statutory standard is that the waiver will serve the national interest, and counsel's observation does not address that standard. Similarly, under the regulation at 8 C.F.R. § 103.3(c), *NYSDOT* is binding precedent on all USCIS employees, and counsel's attempts to set it aside and synthesize an alternative standard from unrelated statutes cannot succeed.

The director denied the petition on December 12, 2012. The director discussed the petitioner's evidence and quoted from several witness letters, and concluded that "[t]he petitioner's employment is limited to a local impact. The petitioner has not established that Congress intended the national interest waiver to serve as a blanket waiver for all teachers."

On appeal, counsel asserts that, at the time of *NYSDOT*'s publication in 1998, there was no "clear-cut Congressional standard" for the national interest waiver. Counsel further contends that, by passing the No Child Left Behind Act (NCLBA) in 2001 (three years after *NYSDOT*), "the United States Congress . . . **has preempted the USCIS** with respect to" the national interest waiver for educators (counsel's emphasis). Counsel, however, identifies no specific legislative or regulatory provisions that exempt school teachers from *NYSDOT* or reduce its impact on them.

The assertion that the NCLBA is tantamount to a retraction or modification of *NYSDOT* is not persuasive; that legislation did not amend section 203(b)(2) of the Act. In contrast, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub.L. 106-95 (November 12, 1999),

specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to create special waiver provisions for certain physicians. Because Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so in direct response to *NYSDOT*, counsel has not made a persuasive claim that the NCLBA indirectly implies a similar legislative change.

Turning to immigration legislation, counsel states:

> With respect to the E21 visa classification, INA § 203(b)(2)(A) provides in relevant part that: "Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the **national . . . educational interests**, . . . of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States."

(Counsel's emphasis.) Counsel, above, highlighted the abridged phrase "national educational interests," but the very same quoted passage also includes the job offer requirement, *i.e.*, the requirement that the alien's "services . . . are sought by an employer in the United States." Counsel has, thus, directly quoted the section of relevant law that supports the director's conclusion. By the plain wording of the statute that counsel quotes on appeal, an alien professional holding an advanced degree is presumptively subject to the job offer requirement, even if that alien "will substantially benefit prospectively the national . . . educational interests . . . of the United States." Neither the Immigration and Nationality Act nor the NCLBA, separately or in combination, create or imply any blanket waiver for teachers, and any attempt to fashion such a waiver out of the wording of the statutes must therefore fail.

Counsel discussed, at length, the "achievement gap" that continues to challenge educators nationwide. Closing that gap is a national goal, but it does not follow that the petitioner's efforts toward that goal are, themselves, national in scope. Counsel does not show that the petitioner has, in fact, made significant strides in "closing the achievement gap." Instead, counsel cited statistics showing "that out of the 24 Maryland school districts [redacted] ranked near the bottom" in 2012. Counsel stated: "The fact that [redacted] did not meet its 2012 AMO target for Reading proficiency underscores the importance of having effective teachers of Reading/Language Arts in each classroom." By 2012, the petitioner had been working for [redacted] for seven years. The district's continued low ranking suggests that, even at the local level, the petitioner's efforts have not resulted in measurable overall improvements; the record does not show that the petitioner has transformed [redacted] into a model for other districts to emulate, or that the petitioner has had unusual success even within her own classroom. Counsel does not explain how the petitioner's future work will "clos[e] the achievement gap" when there is no evidence that her past work has done so to any significant extent.

In a similar vein, counsel asserts that there remains a pressing need for educational reform, because past efforts such as Teach For America have not produced satisfactory results. Counsel does not

show that the petitioner's individual efforts, after several years in the United States, have stood out in this regard.

Counsel protests that "the Director has easily dismissed the [petitioner's] incomparable accomplishments," but submits no credible evidence to show that the petitioner's accomplishments are "incomparable" as claimed. Instead, counsel lists previously submitted materials and declares them to constitute "overwhelming evidence" of eligibility.

Counsel asserts that *NYSDOT*'s guidelines amount to "hypotheticals [that] hold no water," and elsewhere contends that the labor certification process cannot accommodate the petitioner's qualifications. This assertion is not only hypothetical itself, but also demonstrably counter-factual as the petitioner has already obtained a labor certification and, on that basis, an approved petition.

Counsel contends that, under the NCLBA, schools that fail to meet specified benchmarks will lose federal funding and be "abolished," thereby putting the teachers out of work, and therefore United States teachers have an incentive to waive the labor certification requirement for highly qualified teachers. Counsel offers no real-life example of this situation ever happening, and it appears to be one of the "hypotheticals" that counsel condemned elsewhere in the same brief.

As is clear from a plain reading of the statute, engaging in a profession (such as teaching) does not presumptively exempt such professionals from the requirement of a job offer based on national interest. Congress has not established any blanket waiver for teachers. Eligibility for the waiver rests not on the basis of the overall importance of a given profession, but rather on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.